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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 362

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, PETITIONER

v.

WARNER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of A. P. Norton, Deputy Commissioner, United States Employees' Compensation Commission, respectfully prays that a writ of certiorari be issued to review the judgment entered in the above-entitled cause by the United States Circuit Court of Appeals for the Third Circuit on June 17, 1943.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 9–17) is not reported. The opinion of the Circuit Court of Appeals (R. 19–23) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 17, 1943 (R. 23). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the finding of the Deputy Commissioner, that a bargeman is not "a master or member of a crew" within the exclusionary provision of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, is conclusive if reasonably inferable from undisputed basic facts.

STATUTE INVOLVED

Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. sec. 903 (a) (1)), provides:

> SEC. 3. *Coverage.* (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; * * *.

STATEMENT

The facts in the instant case are undisputed and are as follows:

Rusin was employed as a bargeman by the respondent. As such, his duties consisted of the general care of the barge or lighter to which he was at any time assigned, including making lines fast and unfast at docks, and tightening or slackening them as necessary. (R. 10.) By means of a hand-operated capstan he occasionally assisted in shifting the barge which had no motive power of its own but was towed from place to place (R. 10). For that purpose he lived aboard the barge (R. 11), which was documented as a vessel of the United States (see R. 20), eating and sleeping in quarters there provided for his use and supplying his own food (R. 11). The operation of the barge was confined to waters within a radius of thirty miles of Philadelphia (R. 10-11). As bargeman, Rusin was usually subject to orders of respondent's marine superintendent (R. 6), but when in tow he was subject to the control of the tugboat captain. He could not set his own course or control or change it at any time. (R. 11.) He was "unarticled" and had no experience as a

seaman other than that obtained as a bargeman (R. 12). He was paid a flat monthly salary for his service as bargeman, and when he worked on any other boat he received additional compensation at an hourly rate (R. 11). His employment was subject to the contract between the Harbor Boatmen's Union and the Warner Company, which provided, *inter alia* (R. 11):

> Section 6: All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.
>
> Section 7: The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays.

Rusin was injured when the capstan bar, which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall (R. 10). At the time, he was the sole person aboard or employed upon the barge. He thereafter filed a claim for compensation with the Deputy Commissioner.

On the basis of the foregoing facts, the Deputy Commissioner found that Rusin was not a "master or member of a crew," but a harbor worker, entitled to the benefits of the Longshoremen's and

Harbor Workers' Act (R. 9), and granted him a compensation award (see R. 20).

Thereafter pursuant to Section 21 (b) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. sec. 921 (b)), respondent filed suit in the district court to set aside the compensation award (R. 9). The district court affirmed the findings of the Deputy Commissioner, and dismissed the complaint (R. 18).[1]

On appeal, the court below reversed the decree of the district court (R. 23). It recognized that the question whether a particular claimant is "a master or member of a crew" and therefore excluded from the Longshoremen's Act is one of fact, but held that the ultimate findings of fact of the Deputy Commissioner are "not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly call for a different conclusion" (R. 21). Accordingly it found Rusin to be a seaman excluded from the benefits of the Act (R. 22).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Third Circuit erred:

1. In failing to hold that the finding of the Deputy Commissioner that Rusin was not "a mem-

[1] At the hearing before the district court, additional evidence was introduced by consent of the parties. The district court, although it amplified upon the findings of the Deputy Commissioner, in the end accepted these findings *in toto* (R. 11-12).

ber of a crew," but a harbor worker entitled to the benefits of the Act, was conclusive, since it was a reasonable inference from the basic facts.

2. In undertaking to determine, independently of the Deputy Commissioner's ultimate finding, whether Rusin was a harbor worker covered by the Act or "a member of a crew" excluded from the benefits of the Act.

3. In holding, despite the finding of the Deputy Commissioner to the contrary, that Rusin was in fact "a member of a crew" and therefore excluded from the benefits of the Act.

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Longshoremen's and Harbor Workers' Compensation Act provides specifically in Section 3, relating to "Coverage," that no compensation shall be payable in respect of the disability or death of a "master or member of a crew of any vessel." In the present case, the Deputy Commissioner found that at the time of his injury Rusin was not "a member of a crew," but rather was a harbor worker (R. 20); the district court sustained this finding (R. 17). The court below accepted the basic findings of fact made by the Deputy Commissioner, properly holding that they are conclusive since supported by substantial evidence. However, the court proceeded to consider the propriety of the conclusion or inference drawn

by the Deputy Commissioner from those basic facts, i. e., that Rusin was not a master or member of a crew, holding that "a Commissioner's conclusion" to this effect "is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly called for a different conclusion" (R. 21). After such consideration the court below concluded that the Deputy Commissioner's determination was improper principally on the ground that its earlier decision in *Loverich* v. *Warner Co.*, 118 F. (2d) 690, certiorari denied, 313 U. S. 577, involving a claim of a bargeman for maintenance and cure under the maritime law, held that a bargee performing Rusin's duties was a member of a crew. In so holding, the lower court failed to give proper effect to the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. Moreover, in setting aside the award in this borderland area, the decision below is in probable conflict with *Davis* v. *Department of Labor*, 317 U. S. 249, and presents a question of substantial importance in the administration of the Act, particularly as it affects bargemen. And if the question is viewed as one of law, the decision below is in conflict with *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), certiorari denied, 301 U. S. 682, and *De Wald* v. *B. & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4), certiorari denied, 293 U. S. 581.

1. In the *South Chicago* case, as in the instant case, either inference could probably have been

drawn from the basic facts which were undisputed. There this Court, citing its prior decision in *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, held that the inference or conclusion to be drawn from these facts was for the Deputy Commissioner and not for the courts, and that the Deputy Commissioner's conclusion that the decedent was "a member of a crew" was conclusive if supported by evidence (p. 258). This accords with the well-settled rule that inferences drawn by a Deputy Commissioner from facts supported by substantial evidence are final. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287; cf. *Davis* v. *Department of Labor*, 317 U. S. 249, 256; *Gray* v. *Powell*, 314 U. S. 402, 412. The doctrine of the *South Chicago* case as to the finality of the Deputy Commissioner's findings has been reaffirmed by this Court in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246, and in *Marshall* v. *Pletz*, 317 U. S. 383, 388.[2] It has been followed in numerous cases by the lower federal courts which have held that the question whether a par-

[2] In *Cantey* v. *McLain Line, Inc.*, 312 U. S. 667, this Court reversed, without argument a decision which denied recovery to a bargeman under the maritime law, where the lower courts deemed their prior decision in *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), allowing recovery under the Longshoremen's Act, to be controlling. We interpret this Court's reversal and remand as reaffirming the proposition that in borderline cases the question whether a claimant was a member of a crew is one of fact to be found as such by the trier of fact.

ticular claimant is a member of the crew is one of fact to be decided by the Deputy Commissioner. See, e. g., *Henderson* v. *Jones*, 110 F. (2d) 952 (C. C. A. 5); *Puget Sound Freight Lines* v. *Marshall*, 125 F. (2d) 876 (C. C. A. 9); *Pacific Employers Insurance* v. *Pillsbury*, 130 F. (2d) 21 (C. C. A. 9); *Gulf Oil Corp.* v. *McManigal*, 49 F. Supp. 75 (N. D. W. Va.); *Blaske* v. *Bassett*, 35 F. Supp. 315 (E. D. Mo.). The facts in the instant case, although perhaps permitting the contrary inference, clearly support the Deputy Commissioner's ultimate finding. Rusin had no seaman's papers; he had been a painter for thirty-five years; he furnished his own meals in the barge; he received additional compensation for work on other barges; the barge had no complement other than Rusin; and the barge itself was without motive power and had to be towed. The barge served only rivers and harbors within 30 miles of Philadelphia (R. 10) and hence was not required to be manned by persons having certificates of efficiency or service as seamen (46 U. S. C. sec. 672). The decision of the lower court in the instant case, in refusing to recognize the finality of the inference and finding of the Deputy Commissioner that Rusin was not "a member of a crew," conflicts with the decisions above cited.

2. The court below, by relying upon its decision in the *Loverich* case, *supra*, treated as a

question of law[3] what this Court had held in the *South Chicago* case was an inference to be made by the Deputy Commissioner. Viewed as a conclusion of law, the decision of the lower court conflicts with *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), certiorari denied, 301 U. S. 682, and *Dewald* v. *B. & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4), certiorari denied, 293 U. S. 581, holding that bargees with duties substantially the same as Rusin's were not, as a matter of law, masters or members of a crew but rather harbor workers entitled to the benefits of the Longshoremen's Act.

3. The decision in the instant case adversely affects a large class of maritime workers, such as bargemen, and if allowed to stand would deny to a great number of them social and economic benefits which the Longshoremen's and Harbor Workers' Act intended to provide.

The whole economic and social basis for the exemption of the members of a crew from coverage under the Act does not apply to bargemen. The

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[3] The lower court in *Berwind-White Coal Mining Co.* v. *Rothensies*, No. 8074, not yet officially reported (also decided on June 17, 1943), reversed a district court decision sustaining a Social Security tax upon wages paid bargees whose duties were similar to those of Rusin, holding upon grounds similar to those in the instant case that such wages fell within the provisions of Section 811 (b) (5) of the Social Security Act (49 Stat. 639; 53 Stat. 1400; 42 U. S. C. sec. 1011 (b) (5)) excepting from the Act wages paid for "service performed as an officer or member of the crew of a vessel documented under the laws of the United States * * *"

exemption was inserted at the request of the seamen's unions (68 Cong. Rec. 5414), of which bargemen are not members. The exemption reflects the fact that the members of a ship's company receive medical care and treatment aboard ships or in marine hospitals without expense to themselves, are entitled to small payments for maintenance and cure during disability and hospitalization, and usually have an accumulation of wages at the end of a voyage (46 U. S. C. secs. 596, 597)—factors making it possible for them to undergo a period of disability without hardship. But none of these applies to bargemen as a class.

Barges of the type involved in this case are exempt from documentation (46 U. S. C. secs. 332, 335) and the bulk of them are not documented;[1] consequently bargemen are in general not entitled to hospitalization or treatment at the marine hospitals, which are available only to "merchant marine seamen" (24 U. S. C. secs. 26, 26 (a)), that is, seamen aboard documented vessels of the United States (42 C. F. R. secs. 2.21–2.46). Nor is the bargeman afforded care aboard his craft when injured, for there are neither facilities nor personnel to care for him. Bargemen frequently live ashore and customarily go home at night, leaving their

[1] For reasons which do not appear, the owners of the barge in the instant case elected to have it documented.

vessels unattended.[5] They are paid periodically, do not receive accumulated wages at the end of a voyage, and must meet the daily expenses of themselves and their families (cf. R. 11). Such workers require the prompt and sure relief afforded by the Compensation Act; and can hardly afford to sacrifice the more certain if more modest benefits of the Act for a possibly greater recovery under the Jones Act (46 U. S. C. sec. 688) after the law's delays.

The Deputy Commissioner is entitled to consider these marked differences in economic factors when drawing his inference as to whether a particular bargeman is a harbor worker or a member of a crew. The substitution of the judgment of the courts for that of the Deputy Commissioner on such an issue serves to encourage protracted litigation in the borderline situations and tends to defeat the purpose of Congress to alleviate economic hardship to a large class of workmen.

4. It is true that reversal of the lower court's decision might produce a result whereby employees who fall in the shadowy area between harbor workers and members of the crew of a

[5] This custom has been recognized in this Court and elsewhere, and the practice has been held not to give rise to fault. *The Granite State*, 3 Wall. 310; *The Bridgeport*, 14 Wall. 116; *The Kathryn B. Guinan*, 176 Fed. 301 (C. C. A. 2); *The No. C-4*, 300 Fed. 757 (S. D. N. Y.), affirmed, 300 Fed. 761 (C. C. A. 2); *Goodwin-Gallagher Sand & Gravel Corp. v. Washington Bulkley, Inc.*, 31 F. (2d) 112, 114 (E. D. N. Y.), affirmed, 31 F. (2d) 115 (C. C. A. 2).

vessel are permitted to seek compensation under either law. This consequence is outweighed by the administrative benefits derived from according finality to the Deputy Commissioner's conclusions. As cases are constantly arising in which a Deputy Commissioner is called upon to determine whether a claimant is a member of a crew, if the decision below is allowed to stand it will unduly burden and interfere with the orderly administration of the Act. In *Davis* v. *Department of Labor*, 317 U. S. 249, 254, this Court recognized possible serious financial loss and loss of claim through operation of the statute of limitations while the injured employee was erroneously pursuing a remedy in the wrong tribunal, and refused to require employees to "determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership." The decision below conflicts in principle with the *Davis* case; the court below admittedly set aside the award of the Deputy Commissioner on the theory that the Longshoremen's Act and the maritime law cannot overlap and are mutually exclusive.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

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